Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DYSART, TAYLOR, LAY, COTTER & McMONIGLE, P.C.,

Petitioner,

v.

CHICAGO TRUCK DRIVERS, HELPERS & WAREHOUSE WORKERS UNION (INDEPENDENT) PENSION FUND, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court, in protecting the legal profession's zeal for forthrightness and independence and in recognition of the importance of assuring alert self-restraint in the exercise by district courts of the summary power for punishing contempt, has long held that lawyers cannot be subject to the penalty of contempt of court for the advice they give their clients in good faith. *In re Watts*, 190 U.S. 1 (1903); *Maness v. Meyers*, 419 U.S. 449 (1975). The Eighth Circuit's decision – which holds a "law firm's bad faith *vel non* is immaterial to the court's finding of contempt" – directly conflicts with the Court's precedent and chills the legal profession's duty of zealous representation, undermines the attorney-client relationship, and threatens the individual rights and security of lawyers and their clients.

The question presented is whether a law firm can be held subject to the contempt of court sanction, in conflict with the Court's longstanding precedent, for giving legal advice to a client in the absence of any evidence or finding that the law firm gave the advice in bad faith.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the Court below:

The Petitioner is Dysart, Taylor, Lay, Cotter & McMonigle, P.C.

The Respondents are Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Pension Fund; Fred Boudreau, trustee of Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund; Jack Stewart and William H. Carpenter, the present trustees; and John Broderick.

STATEMENT UNDER RULE 29.6

In accordance with United States Supreme Court Rule 29.6, Petitioner states that it has no parent company, and no publicly held company has any interest in it.

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Petitioner Dysart, Taylor, Lay, Cotter & McMonigle, P.C., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit which conflicts with the Court's decisions in *In re Watts*, 190 U.S. 1 (1903), and *Maness v. Meyers*, 419 U.S. 449 (1975), and chills the legal profession's duty of zealous representation, undermines the attorney-client relationship, and threatens the individual rights and security of lawyers and their clients.

OPINIONS BELOW

The district court's memorandum and order (per Noce, M.J.) finding Petitioner in contempt of court and awarding sanctions is published at 230 F. Supp. 2d 963. Pet. App. 16a. The opinion of the United States Court of Appeals for the Eighth Circuit (per Bowman, J., joined by Arnold, J.) is published at 406 F.3d 955. Pet. App. 1a. The Honorable Michael J. Melloy filed a dissenting opinion. Pet. App. 9a. The Eighth Circuit's order denying rehearing and rehearing *en banc* is not otherwise published. Pet. App 33a.

STATEMENT OF JURISDICTION

The Eighth Circuit entered its opinion on May 4, 2005, and denied rehearing and rehearing *en banc* on July 25, 2005. Petitioner invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner Dysart, Taylor, Lay, Cotter & McMonigle, P.C., is a law firm that represented several corporations controlled by Steven Gula (Corporate Defendants) in an underlying

action filed by the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund and its trustees (collectively, the Fund) to require interim pension fund payments under ERISA, pending arbitration.[1] Pet. App. 2a-3a, 17a-18a. On December 4, 1996, the district court granted the Fund summary judgment and issued a judgment requiring the Corporate Defendants to, "within 60 days . . . pay to [the Fund] the interim payments demanded by the [Fund] in the amended demand." Pet. App. 3a, 35a-36a. The district court did not label the judgment an injunction and did not treat it as one. Pet. App. 12a, 34a-36a.

The Fund timely filed a motion to amend the December 1996 judgment under FED. R. CIV. P. 59(e) to specify the exact amount and timing of the interim payments and to seek past due amounts, attorneys' fees, and interest from the Corporate Defendants. Pet. App. 5a, 9a-10a. On the Corporate Defendants' behalf, Petitioner timely filed a motion for reconsideration of the district court's judgment under FED. R. CIV. P. 60. *Chicago Truck Drivers Union Pension Fund v. Brotherhood Labor Leasing*, 974 F. Supp. 751, 753 (E.D. Mo. 1997).

On February 26, 1997, Howard Lay of Petitioner spoke with Steven Gula and advised him concerning the December 1996 judgment, the Corporate Defendants' motion for reconsideration, and the advisability of filing an appeal.

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1. The district court, in the first instance, possessed subject-matter jurisdiction under 28 U.S.C. § 1331 because the Fund's claims arose under a Federal statute, the Employee Retirement Income Security Act of 1974 (as amended by the Multiemployer Pension Plan Amendments Act of 1980), 29 U.S.C. §§ 1001-1461. In addition, the district court had jurisdiction, in the first instance, to enter the contempt sanction under 28 U.S.C. § 636(e)(4).

Pet. App. 22a. The district court found that Petitioner advised Mr. Gula that he should not pay any material sums of money from the Corporate Defendants to himself, that the Corporate Defendants could pay bills for their normal ongoing business operations, and make the payments ordered by the district court if there was enough cash available. Pet. App. 11a, 22a-23a.

On June 13, 1997, the district court granted Petitioner leave to withdraw as counsel in the case. Pet. App. 3a.

On June 25, 1997, the district court granted the Fund's motion to amend the December 1996 judgment and entered a final judgment, specifying that the Corporate Defendants were to make quarterly interim payments in the amount of $17,834 starting on August 1, 1997. *Chicago Truck Drivers Pension Fund v. Brotherhood Labor Leasing*, 974 F. Supp. 751, 756 (E.D. Mo. 1997). The district court also ordered the Corporate Defendants, for the first time, to pay the Fund past due interim payments, liquidated damages, interest, attorneys' fees and costs. *Id.* The district court did not label its amended judgment an injunction. *Id.*

The Corporate Defendants failed to make any interim payments enumerated in the final judgment. Pet. App. 3a. In November 1998, the Fund requested the district court to find the Corporate Defendants and their officers in contempt. *Id.* The district court denied the motion, and the Fund appealed. *Id.*

On March 24, 2000, the United States Court of Appeals for the Eighth Circuit remanded the case for further consideration on the contempt issue. *Chicago Truck Drivers Pension Fund v. Brotherhood Labor Leasing*, 207 F.2d 500

(8th Cir. 2000). On remand, the Fund filed an amended petition, alleging Petitioner and the other attorneys who had represented the Corporate Defendants were guilty of contempt for the advice they gave the Corporate Defendants. Pet. App. 4a.

On September 12, 2002, the district court found that Steven Gula and Petitioner acted in contempt of the court's directives. Pet. App. 28a. The district court also concluded Petitioner aided and abetted Mr. Gula's failure to pay the Fund by advising the Corporate Defendants they could pay other creditors, including Petitioner, before paying the Fund. Pet. App. 4a, 28a-29a. The district court ordered Petitioner to pay the Fund $12,855.55, which represented the amount Petitioner received in legal fees from the Corporate Defendants after the district court entered its December 1996 judgment. Pet. App. 4a, 30a, 32a. The Fund did not allege that Petitioner's advice was given in bad faith and the district court did not address this issue. Pet. App. 7a. In its decision, the district court found that, at the time Petitioner gave its advice, the Corporate Defendants had over $200,000 in cash assets and about $90,000 in other assets, as evidenced by their 1996 tax return. Pet. App. 24a. The Corporate Defendants reported a similar amount of cash and other assets on their tax return a year later. *Id.*

Petitioner appealed the district court's contempt order. Petitioner asserted it could not be held in contempt because the December 1996 judgment was neither a final order nor an injunction and it could not be construed as an injunction. Pet. App. 5a. Petitioner also challenged the sanction because there was no finding by the district court that Petitioner had acted in bad faith. Pet. App. 7a. Finally, Petitioner argued the district court erred in finding Petitioner in contempt of

the district court's June 1997 final judgment because Petitioner had been granted leave of court to withdraw as the Corporate Defendants' counsel twelve days earlier and, therefore, had no role in advising its former clients on how to respond to the final judgment. *Id.*

The Eighth Circuit, in a two-one decision, affirmed the district court's contempt sanction. Pet. App. 1a. The Eighth Circuit rejected all three of Petitioner's arguments. The Eighth Circuit explained: (1) If the December 1996 judgment was not an injunction, it looked like one; (2) Petitioner's withdrawal before the entry of the June 1997 final judgment was irrelevant to the district court's finding of contempt based on the advice Petitioner gave on the December 1996 judgment; and (3) "[Petitioner's] bad faith *vel non* is immaterial" to the district court's finding of contempt. Pet. App. 5a-8a.

The Honorable Michael J. Melloy filed a dissenting opinion. He explained:

> I believe that the lawyers in this case are being penalized for doing what lawyers do. That is, they give advice to clients, sometimes to clients who are in financial distress, and get paid for that advice. The district court, and now the majority, have held that doing so may subject the lawyer to civil contempt and the payment of substantial damages. I believe that such a holding puts at peril any attorney who represents financially distressed clients.

Pet. App. 9a.

Citing the Court's decisions in *In re Watts*, 190 U.S. 1 (1903), and *Maness v. Meyers*, 419 U.S. 449 (1975), Judge Melloy disagreed with the majority's conclusion that Petitioner's legal advice rose to the level of aiding and abetting an injunction violation in the absence of a finding that Petitioner gave its advice in bad faith. Pet. App. 11a-12a.

> I part company with the majority when it states that the law firm's bad faith is immaterial to the court's finding of contempt. A law firm that gives legal advice in good faith is not subject to contempt as an aider and abettor of its client.

Pet. App. 12a.

Judge Melloy also concluded the contempt sanction should have been set aside because Petitioner did not realize an injunction existed. Pet. App. 12a-14a.

> In light of the attorneys [sic] reasonable belief that the judgment was not an injunction, much less a final injunction, the attorneys' advice regarding how to deal with the order was not substantially improper as to rise to the level of contempt.

Pet. App. 14a. He observed that when the district court entered the December 1996 judgment, the case law tended to suggest that the judgment was not an injunction. Pet. App. 12a. Citing a Seventh Circuit decision involving the Fund, the same plaintiff as in this case, he noted "[t]he only circuit authority on the issue had found that such an interim order for payment of ERISA withdrawal liability was not an injunction." Pet. App. 12a-13a (citing *Trustees of the Chicago*

Truck Drivers Union (Independent) Pension Fund v. Central Transport, Inc., 935 F.2d 114, 117 (7th Cir. 1991)).

Judge Melloy also addressed the case's procedural posture when Petitioner gave its advice at issue, noting the lawyers for both the Fund and the Corporate Defendants had "legitimate questions" as to whether the December 1996 judgment was a final order because the Fund timely filed a motion to alter and amend the judgment under FED. R. CIV. P. 59(e). Pet. App. 13a. He explained:

> [N]either party appealed the judgment, likely due to doubt regarding whether it was ripe for appeal. The Fund never tried to enforce the order. It only started execution proceedings in November 1998, after entry of the final order in June 1997 [after Petitioner withdrew from the case]. Accordingly, I firmly believe the movant fell far short of proving by clear and convincing evidence that [Petitioner] aided and abetted a violation of an injunction when the firm did not even realize that an injunction existed.

Pet. App. 13a.

Finally, Judge Melloy discussed the chilling effect the Eighth Circuit's decision has on the practice of law and the independence of the bar, especially in providing legal advice to financially distressed clients.

> Under the majority's ruling, a lawyer advising a financially distressed client as to how to deal with competing legal obligations is at risk of a contempt citation for providing such advice and

> receiving payment for those services. As the petitioner correctly suggests, to expose lawyers to a possible contempt in this situation will temper attorney advocacy and impede clients' ability to obtain advice when it is most needed.

Pet. App. 14a.

This petition for a writ of certiorari follows the Eighth Circuit's denial of Petitioner's timely filed petition for rehearing and rehearing *en banc*. Pet. App. 33a. The Eighth Circuit's denial of the petition was not unanimous. The Honorable Kermit E. Bye and the Honorable Michael J. Melloy would have granted the petition for rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

The petition should be granted for two reasons. First, the Eighth Circuit's decision is directly contrary to the Court's decisions in *Maness v. Meyers*, 419 U.S. 449, 467-68 (1975), and *In re Watts*, 190 U.S. 1, 29 (1903). In those cases, the Court held that a lawyer – acting in good faith – cannot be held in contempt for giving advice to a client, even if the advice later turns out to be wrong. Here, there was no finding that Petitioner acted in bad faith in advising its clients, and the Eighth Circuit held the issue of bad faith was immaterial to the district court's finding of contempt.

Second, "the importance of assuring alert self-restraint in the exercise by district judges of the summary power for punishing contempt" warrants the Court's review of the Eighth Circuit's decision. *Offutt v. United States*, 348 U.S. 11, 13 (1954); *In re McConnell*, 370 U.S. 230, 233 (1962). Absent the Court's exercise of its supervisory authority over

the lower federal courts, the Eighth Circuit's decision will invite other courts to second-guess attorneys' good-faith advice, based on their interpretation of the law and the facts, and find them in contempt, with the benefit of hindsight. Barring reaffirmation of the Court's contempt precedent, this new legal standard will chill attorney advocacy, undermine the attorney-client relationship, and threaten the individual rights and security of lawyers and their clients.

I. Certiorari Is Warranted Because The Eighth Circuit's Decision Conflicts With The Court's Longstanding Precedent Holding Lawyers Are Not Subject To Contempt For Providing Good Faith Legal Advice To Their Clients.

The Eighth Circuit, in affirming the district court's contempt sanction against Petitioner, held: "[W]e agree that the law firm's bad faith *vel non* is immaterial to the court's finding of contempt in this case." Pet. App. 7a. Review is warranted because the Eighth Circuit's decision conflicts with the Court's precedent holding that lawyers are not subject to contempt as aiders and abettors of their clients when they provide their clients advice in good faith. *See In re Watts*, 190 U.S. 1, 29 (1903) ("In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment."); *Maness v. Meyers*, 419 U.S. 449, 467-68 (1975) (holding an attorney is not subject to contempt for good faith legal advice regarding the Fifth Amendment). *See also In re McConnell*, 370 U.S. 230, 236 (1962) (The fair administration of justice requires lawyers to be free to make honest, good-faith efforts to present their clients' cases.); *Arthur Andersen LLP v. United States*, 544 U.S. __ (2005) (Federal obstruction of

justice statute prohibiting the corrupt persuasion of a witness to withhold testimony or destroy records requires proof of conscious wrongdoing.).

Civil contempt must be proven by clear and convincing evidence. *Chicago Truck Drivers v. Brotherhood Labor Leasing*, 207 F.3d 500, 505 (8th Cir. 2000). The contempt power is a most potent weapon; therefore, it must be carefully and precisely employed. *Independent Fed'n of Flight Attendants v. Cooper*, 134 F.3d 917, 920 (8th Cir. 1998). The importance of assuring "alert self-restraint in the exercise by district judges of the summary power for punishing contempt" prompts the Court's review. *Offutt v. United States*, 348 U.S. 11, 13 (1954); *In re McConnell*, 370 U.S. 230, 233 (1962).

To hold a party in civil contempt, the district court must show a decree setting forth in specific detail an unequivocal command that the party in contempt violated. *Stotler & Co. v. Able*, 870 F.2d 1158, 1163 (7th Cir. 1989). A party can be held in contempt only for engaging in behavior clearly prohibited by a court order. *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 460 (7th Cir. 1993).

The standard for holding a non-party in contempt is higher. A non-party can be held in contempt only if the movant shows by clear and convincing evidence that the non-party aided or abetted a party in a concerted violation of a court order. *Independent Fed'n*, 134 F.3d at 920.

To find a non-party attorney in contempt, the standard is even higher. An attorney's advice is pivotal to the client's decision-making ability; therefore, attorneys cannot be held in contempt if they give their clients advice in good faith,

even if the advice is contrary to the law. *Maness*, 419 U.S. at 465-68. Restated, unless attorneys act in bad faith, they cannot be subject to contempt when they advise their clients to defy a court order. *In re Watts*, 190 U.S. at 32.

In *Watts*, the lawyers advised their clients in good faith that a state court, rather than a federal court, had bankruptcy jurisdiction over certain property possessed by a state receiver. The lawyers' advice resulted in a conflict between state and federal courts and a federal contempt sanction against the lawyers. Although this Court held the lawyers' advice was incorrect, the Court overturned the contempt penalties because there was no evidence the lawyers gave their advice in bad faith. The Court explained:

> [T]he essence of the alleged contempt was that, assuming that action was taken pursuant to the advice of these attorneys, they were liable to condemnation for giving such advice. In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule.

Watts, 190 U.S. at 29.

The Court reaffirmed this rule in *Maness v. Meyers*, 419 U.S. 449, 467-68 (1975), where the Court held lawyers cannot be subject to the contempt penalty for advising their clients, in good faith, to assert the Fifth Amendment privilege

against self-incrimination. The Court explained that if lawyers were exposed to the threat of contempt for giving honest advice, some lawyers may lose their zeal for forthrightness and independence. *Id.* at 466. *See also In re McConnell*, 370 U.S. 230, 236 (1962) (criminal contempt conviction reversed where lawyer's repeated insistence that he be allowed to make an offer of proof was nothing more than strenuous and persistent advocacy undertaken in good faith).

The rule followed by other American jurisdictions is in accord. State courts have long held that lawyers cannot be held in contempt when they advise their clients in good faith. *See, e.g., In re Willis*, 5 So.2d 716, 721 (Ala. 1941); *In re Landau*, 243 N.Y.S. 732, 735-36 (A.D. 2 1930); *Sidway v. Sidway*, 141 N.Y.S. 391, 394 (A.D. 2 1913); *Oakley v. Cokalete*, 44 N.Y.S. 1070, 1071 (A.D. 2 1897).

The Court's governing authority warrants only one conclusion in this case. The contempt sanction against Petitioner should have been set aside. Absent is any evidence that Petitioner acted in bad faith in advising its clients on the legal effect of the December 1996 judgment.

Petitioner represented an ongoing concern that had over $200,000 in cash assets and was faced with what appeared to be a non-final order for payment of $17,834, four times per year. To stay in business, the Corporate Defendants had to pay their ongoing expenses (*e.g.*, rent, taxes, etc.). The district court found that Petitioner advised the Corporate Defendants (1) not to pay money to its officers; (2) to pay their normal ongoing expenses; and (3) to pay the Fund if there was cash available. Pet. App. 11a, 22a-23a. It is hard to see how this advice could be considered wrong, much less in bad faith.

Moreover, the Corporate Defendants did not follow Petitioner's advice, because they did not pay anything to the Fund despite having money available to do so. Pet. App. 3a. Under the December 1996 judgment, the Corporate Defendants owed only $35,668 before Petitioner withdrew as counsel in June 1997 (two quarterly payments of $17,834 each). According to the District Court's order, the Corporate Defendants had enough cash to make quarterly payments for the next two and one-half years. Pet. App. 24a. Petitioner withdrew from the case before being called upon to give advice on the June 1997 final judgment that ordered payment of substantial past due amounts, in addition to the quarterly interim payments. *Id.* Nevertheless, the Eighth Circuit held Petitioner responsible for the Corporate Defendants' subsequent dissipation of their assets, even though the Corporate Defendants had retained new counsel to replace Petitioner.

Further, Petitioner's advice in February 1997 was consistent with the extant law. Petitioner reasonably believed the December 1996 judgment was not immediately enforceable by the Fund because it was neither a final judgment nor an injunction. *See* Judge Melloy's dissenting opinion. Pet. App. 11a-13a.

The December 1996 judgment was not a final judgment because the Fund timely filed a motion under FED. R. CIV. P. 59(e) to amend the judgment. *See Innovative Home Health Care, Inc. v. P.T.-O.T. Assocs. of the Black Hills*, 141 F.3d 1284, 1286 (8th Cir. 1998) (a timely filed Rule 59(e) motion prevents finality). As a non-final judgment for the payment of money, the 1996 judgment was neither appealable nor enforceable. *See, e.g., Gerardi v. Pelullo*, 16 F.3d 1363, 1371 n. 13 (3d Cir. 1994) (execution will not issue for a non-final judgment).

Also, Petitioner reasonably believed the December 1996 judgment was not an injunction. The prevailing law at the time supported Petitioner's belief. In *Trustees of the Chicago Truck Drivers Union (Independent) Pension Fund v. Central Transport, Inc.*, 935 F.2d 114 (7th Cir. 1991), the same Fund that is the plaintiff in this case unsuccessfully sought to enforce an interim payment order with a motion for contempt. The district court denied the motion, finding the interim payment order was *not* an injunction. The Seventh Circuit affirmed, holding the Fund had not asked the district court to enter an injunction and the district court's order was not cast as an injunction. 935 F.2d at 120. *See also Trustees of the Chicago Truck Drivers Union (Independent) Pension Fund v. Rentar Indus., Inc.*, 951 F.2d 152, 154 (7th Cir. 1991) ("[T]hese orders are not injunctions, but rather money judgments."); *Korea Shipping Corp. v. New York Shipping Ass'n*, 811 F.2d 124, 126 (2d Cir. 1987) ("[W]e hold the payment order was not a preliminary injunction.").

In this case, the Fund never asked the district court to issue an injunction, and the December 1996 judgment – like the order considered by the Seventh Circuit in the *Central Transport* case – was not cast as an injunction. As observed by Judge Melloy in his dissenting opinion:

> In late 1996 and early 1997 the issue of whether the interim order was, in fact, an injunction was not at all clear. At the time the order was entered, even the Magistrate Judge did not believe the order was an injunction as evidenced by his failure to treat it as such in 1996.

Pet. App. 12a.

Moreover, the Fund did not treat the December 1996 judgment as an injunction. When it moved to amend the judgment, the Fund did so under FED. R. CIV. P. 59(e), the rule regarding amendment of judgments, and not FED. R. CIV. P. 65, the rule regarding injunctions.

In its 2000 opinion in this case, *Chicago Truck Drivers v. Brotherhood Labor Leasing*, 207 F.3d 500, 507 (8th Cir. 2000), the Eighth Circuit held the district court's 1997 final judgment could be enforced with a contempt citation because, while it "was not labeled an injunction, it looked like one. . . ." This decision is directly contrary to the Seventh Circuit's 1991 holding in *Central Transport*. 935 F.2d at 117, 120. But, Petitioner did not have the benefit of the Eighth Circuit's 2000 opinion when it rendered legal advice in early 1997. Petitioner had no choice but to give its clients advice based on its good faith analysis of the law existing at the time. As demonstrated by the Seventh Circuit's decision, and Judge Melloy's dissenting opinion, the extant law established at the time Petitioner advised its clients that the district court's December 1996 judgment was not an injunction. Pet. App. 12a-13a.[2]

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2. Unlike the June 1997 final judgment, the December 1996 judgment did not look like an injunction, and it was not enforceable as an injunction because it contravened FED. R. CIV. P. 65(d) by incorporating a reference to the Fund's "amended demand." The December 1996 judgment stated:

> [D]efendants shall, within 60 days of the date of this judgment order, commence payment to plaintiffs of the interim payments of the withdrawal liability of Be-Mac Transport Company, Inc., *demanded by the plaintiffs in their amended demand.* (Emphasis added.)

(Cont'd)

Contrary to the Court's precedent governing contempt sanctions against lawyers, a lawyer's advice – given in good faith and with the honest belief that the advice is well founded and in the client's just interests – becomes the fodder of contempt under the Eighth Circuit's decision. *In re Watts*, 190 U.S. 1, 29 (1903); *Maness v. Meyers*, 419 U.S. 449, 465-68 (1975). Therefore, as the Eighth Circuit's decision conflicts with the Court's precedent, review is warranted to reaffirm the Court's decisions limiting the exercise of the contempt sanction against lawyers to those cases in which lawyers advise their clients in bad faith.

(Cont'd)

Pet. App. 35a-36a. Rule 65(d) requires every order granting an injunction to "describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained. . . ." The Fourth, Fifth, Seventh, and Tenth Circuits require Rule 65(d) to be strictly construed. *See, e.g., Consumers Gas & Oil, Inc. v. Farmland Indus., Inc.*, 84 F.3d 367, 370-71 (10th Cir. 1996); *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 461 (7th Cir. 1993); *Seattle-First Nat'l Bank v. Manges*, 900 F.2d 795, 799-800 (5th Cir. 1990); and *Thomas v. Brock*, 810 F.2d 448, 450 (4th Cir. 1987). Therefore, contempt sanctions cannot be issued on an injunction that describes the prescribed conduct by reference to another document. As explained by the Seventh Circuit, "Rule 65(d) is no mere extract from a manual of procedural practice. It is a page from the book of liberty." *H.K. Porter Co., Inc. v. National Friction Prods. Corp.*, 568 F.2d 24, 27 (7th Cir. 1977).

II. The Eighth Circuit's Decision, Which Conflicts With The Court's Precedent, Calls For The Court's Exercise Of Its Supervisory Authority Over The Lower Federal Courts To Assure Self-Restraint In The Exercise Of The Contempt Power And To Remedy The Far-Reaching, Negative Effects Of The Eighth Circuit's Decision Which Chills Zealous Advocacy, Undermines The Attorney-Client Relationship, And Threatens The Individual Rights And Security Of Lawyers And Their Clients.

Review of the Eighth Circuit's decision is warranted because the use of the contempt power against lawyers – in the absence of bad faith – chills the legal profession's duty of zealous representation, undermines the attorney-client relationship, and threatens the individual rights and security of lawyers and their clients. The exercise of the contempt power, in the absence of bad faith, and even its potential for exercise, subvert vigorous advocacy and representation.

The Eighth Circuit's decision strikes at the very heart of the practice of law. The decision punishes lawyers for being lawyers. In his dissent, Judge Melloy observed:

> I believe that the lawyers in this case are being penalized for doing what lawyers do. That is, they give advice to clients, sometimes to clients who are in financial distress, and get paid for that advice. The district court, and now the majority, have held that doing so may subject the lawyer to civil contempt and the payment of substantial damages. I believe that such a holding puts at peril

> any attorney who represents financially distressed clients.

Pet. App. 9a.

Lawyers are bound to provide their clients with an informed understanding of their legal rights and obligations. Mo. Sup. Ct. R. 4, Preamble: A Lawyer's Responsibilities. Lawyers must explain the practical implications of these rights and obligations. *Id.* Lawyers must also zealously assert their clients' positions under the rules of the adversary system. *Id.* As advisors, lawyers must exercise independent professional judgment and render candid advice. Mo. Sup. Ct. R. 4-2.1. The Eighth Circuit's decision limits the legal profession's ability to satisfy these ethical duties. For advice given in good faith now exposes lawyers to the contempt sanction.

Petitioner had to advise the Corporate Defendants on the consequences of the December 1996 judgment. Judge Melloy, in his dissenting opinion, summarized the issues that Petitioner was required to address with its clients in the face of the district court's judgment, including:

> What was the effect of the Rule 59(e) motion? Was the order final, given the filing of the motion to alter or amend? Was the order appealable? Can other operating expenses be paid before payment of the withdrawal liability? Should the company begin paying the judgment (assuming it was a final judgment), appeal, attempt to settle, or file bankruptcy?

Pet. App. 11a. Under the circumstances, Petitioner could do nothing other than advise the Corporate Defendants on these questions in good faith based on the existing facts and extant law.

Yet, the Eighth Circuit's decision subjects Petitioner to liability in contempt for errors in judgment in giving necessary and timely legal advice. In effect, the Eighth Circuit's decision presents lawyers with a Hobson's Choice – either advise their clients and risk contempt or abdicate their professional duties to provide their clients with an informed understanding of their rights and obligations.

The contempt sanction in this case is especially egregious because Petitioner's advice in February 1997 was correct under the extant law. In this case, Petitioner's purported error in judgment became evident only in hindsight because of later developments in the law concerning the treatment of interim payment orders as injunctions. *Compare Trustees of the Chicago Truck Drivers Union (Independent) Pension Fund v. Rentar Indus., Inc.*, 951 F.2d 152, 154 (7th Cir. 1991) (interim order for payment of ERISA withdrawal liability is not an injunction) *with Chicago Truck Drivers Union Pension Fund v. Brotherhood Labor Leasing*, 207 F.3d 500, 507 (8th Cir. 2000) (interim payment order "looked like" an injunction).

Now, lawyers, mindful of running afoul of the contempt power, may "play it safe" and take overly conservative approaches in representing and advising their clients. Lawyers may decline cases, reject a legal position, or forgo advice or argument because the matter is unsettled, too risky, or might otherwise vex a court. Clients with novel or disfavored claims may go without representation.

This chilling effect on zealous representation is particularly true in the case of financially distressed clients who seek the advice and assistance of tax, bankruptcy, and transaction lawyers. Lawyers, with knowledge that the acceptance of a fee may expose them to contempt, may pause before giving advice to distressed clients with competing legal and financial obligations. These clients may not be able to obtain legal representation when they are in financial peril and need a lawyer's advice the most.

The chilling effect of the Eighth Circuit's decision on the practice of law cannot be minimized. The contempt power approved by the Eighth Circuit – in contradiction to the Court's longstanding precedent – will hang over lawyers and their clients like the Sword of Damocles. As observed by Justice Thurgood Marshall, the great danger of the Damoclean Sword is "that it hangs – not that it drops." *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting) (discussing the deterrent effect of a statute imposing imprecise proscriptions on speech).

Indeed, lawyers will be reticent to give legal advice about the interpretation of an interim payment order, or any other injunction or court order, for fear that a court may later hold them in contempt, even if their advice is given in good faith. Under the Eighth Circuit's decision, if any order for the payment of money is issued against a financially distressed client, that order will be effectively unappealable because lawyers will be reluctant to accept any fees from a financially distressed client that has been ordered by a court to pay money. Accepting a fee for pursuing post-judgment relief or an appeal could be construed by a court as advising the client to violate the order by paying a debt in contravention of the order. Lawyers will be put in the unenviable position of

having to audit their client's finances before giving advice about how to comply with an order to pay money and before accepting any fees for their advice.

The Eighth Circuit's decision undermines the alliance between lawyers and their clients by generating conflicts of interest. The Eighth Circuit's decision invites lawyers to consider their self-interest in avoiding the contempt penalty before representing and advising their clients, to their clients' detriment.

The Eighth Circuit's decision threatens the legal profession's independence. A vigorous, independent bar is an indispensable part of our justice system. *In re McConnell*, 370 U.S. 230, 236 (1962) (criminal contempt conviction reversed where lawyer's repeated insistence that he be allowed to make an offer of proof was nothing more than strenuous and persistent advocacy undertaken in good faith). The fair administration of justice requires lawyers to be free to make honest, good-faith efforts to present their clients' cases. *Id.* Otherwise, where lawyers are exposed to the contempt sanction for "giving honest advice it is hardly debatable that some advocates may lose their zeal for forthrightness and independence." *Maness v. Meyers*, 419 U.S. 449, 466 (1975).

This loss of independence exacerbates the legal profession's exposure for malpractice liability. Lawyers owe duties to their clients and to the courts that sometimes conflict. Lawyers are under an ever-increasing threat of legal malpractice actions if they do not give correct advice to their clients. Lawyers are also increasingly being sued by non-parties under theories that lawyers owe duties to parties other than their clients. *See, e.g., Donahue v. Shughart,*

Thomson & Kilroy, P.C., 900 S.W.2d 624 (Mo. banc 1995) (holding non-clients can sue lawyers under certain circumstances). To find the failure to give advice to a client may subject a lawyer to civil liability, but giving the advice may subject the lawyer to civil contempt, puts lawyers in an untenable position that chills the advice they give their clients, undermines the attorney-client relationship, and increases the risk of attorney malpractice liability based on the failure to give unfettered appropriate and candid advice.

This threat to the independence of lawyers to act on their clients' behalf is further compounded by the standardless nature of the exercise of the contempt power against lawyers who have acted in good faith and upon an honest belief in advising their clients or in pursuing a course of action. As noted by Justice Oliver Wendell Holmes in his Harvard lectures:

> [A]ny legal standard must, in theory, be capable of being known. When a man has to pay damages, he is supposed to have broken the law, and he is further supposed to have known what the law was.

OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881), *reprinted in* RICHARD A. POSNER, THE ESSENTIAL HOLMES at 251 (1992).

The Eighth Circuit's decision provides no guidance when lawyers acting in good faith may be subject to contempt and undermines the importance of assuring alert self-restraint in the exercise by the district courts of the contempt power. Under the Eighth Circuit's decision, whether the lawyer acts in good faith or bad is irrelevant to the calculus of contempt. Pet. App. 7a.

Consistent with the Court's longstanding precedent, contempt in the absence of bad faith is impermissible. *In re Watts*, 190 U.S. 1, 29 (1903); *Maness v. Meyers*, 419 U.S. 449, 467-68 (1975); and *In re McConnell*, 370 U.S. 230, 236 (1962). Only the bad-faith standard provides lawyers with a polestar to govern their actions and the district courts a standard to guide their exercise of the contempt power with restraint. Therefore, the Court should grant review in this case because of the far-reaching negative consequences the Eighth Circuit's decision will have on lawyers, their clients, and the judicial system.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED MAY 4, 2005

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 02-3622

Chicago Truck Drivers, Helpers & Warehouse Workers Union Pension Fund; Fred Boudreau, trustee of Chicago Truck Drivers, Helpers and Warehouse Workers Union Pension Fund; Jack Stewart; William H. Carpenter, the present trustees; John Broderick,

Plaintiffs - Appellees,

v.

Brotherhood Labor Leasing, a Missouri corporation; MFI Leasing Company, a Missouri corporation; Falls City Industries, Inc., a Kentucky corporation; Middlewest Freightways, Inc., a Missouri corporation,

Defendants,

v.

Steven M. Gula; William H. Behrens; Ann Gula,

Contemnors,

Appendix A

Dysart, Taylor, Lay, Cotter & McMonigle, P.C.,

Contemnor - Appellant,

Peter Gabriel Bender; Michael, Best & Friedrich, LLC; Lashly Baer,

Contemnors.

Submitted: September 12, 2003

Filed: May 4, 2005

Appeal from the United States District Court
for the Eastern District of Missouri

Before MORRIS SHEPPARD ARNOLD, BOWMAN, and MELLOY, Circuit Judges.

BOWMAN, Circuit Judge.

The law firm of Dysart, Taylor, Lay, Cotter and McMonigle, P.C., appeals from the order of the District Court[1] finding the firm in civil contempt of court and imposing sanctions. We affirm.

In the underlying action that gave rise to the finding of contempt, Chicago Truck Drivers, Helpers and Warehouse Workers Union Pension Fund and its trustees (collectively, the Fund) sued several corporations owned by Steven Gula to collect withdrawal liability payments under ERISA.[2]

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1. The Honorable David D. Noce, United States Magistrate Judge for the Eastern District of Missouri, sitting with the consent of the parties under 28 U.S.C. § 636(c).

2. Employee Retirement Income Security Act of 1974 (as amended by the Multiemployer Pension Plan Amendments Act (Cont'd)

Appendix A

At one time during the relevant period, the corporations were represented by Dysart Taylor. On December 4, 1996, the District Court entered summary judgment for the Fund, holding that the corporations would "be required, within 60 days of the date of the judgment order issued herewith, to pay to plaintiffs the interim payments demanded by the plaintiffs in the amended demand." *Chicago Truck Drivers Union Pension Fund v. Bhd. Labor Leasing,* 950 F.Supp. 1454, 1471 (E.D.Mo.1996). In accordance with the provisions of ERISA, the court ordered that any further disputes between the parties would be "submitted to an arbitrator." *Id.* On June 13, 1997, Dysart Taylor was granted leave to withdraw from the case. On June 25, 1997, the District Court entered an amended judgment against the corporations, which included awards to the Fund for delinquent and future withdrawal liability, with dollar amounts noted and due dates specified, and awards for attorney fees, costs, interest, and liquidated damages. *Chicago Truck Drivers Union Pension Fund v. Bhd. Labor Leasing,* 974 F.Supp. 751, 756-57 (E.D.Mo.1997).

In November 1998, the Fund sought to have the corporations and their officers held in contempt for failure to pay any of the court-ordered judgments. The District Court denied the Fund's petition. The Fund appealed and we remanded. *Chicago Truck Drivers Union Pension Fund v. Bhd. Labor Leasing,* 207 F.3d 500 (8th Cir.2000).

(Cont'd)

of 1980), 29 U.S.C. §§ 1001-1461. Under ERISA, an employer that withdraws from a multiemployer pension plan will be liable to the plan for "the allocable amount of unfunded vested benefits." 29 U.S.C. § 1381(b)(1).

Appendix A

We concluded that the District Court had made some errors in ruling on the Fund's petition and so it was an abuse of the court's discretion to deny the contempt petition. In remanding, we also said this in a footnote: "The suggestion that the Appellees' attorneys advised them to pay their legal fees in lieu of making court-ordered payments, if true, is troubling. But we have no occasion to consider the question [of whether prior counsel might be held in contempt] on this record because the Fund only sought a contempt sanction against the Appellees and Gula, not their lawyers." *Id.* at 507 n. 7.

On remand, the Fund amended the petition to name the corporations' and officers' attorneys as additional alleged contemnors. The District Court held a hearing on the petition and determined that Steven Gula and Dysart Taylor acted in contempt of the court's orders.[3] *Chicago Truck Drivers Union Pension Fund v. Bhd. Labor Leasing,* 230 F.Supp.2d 963, 970 (E.D.Mo.2002). According to the court, the law firm aided and abetted Gula's failure to pay the Fund. The court agreed with the Fund's assertion that attorneys at Dysart Taylor were aware that the corporations' assets were not sufficient to pay both the Fund and other creditors, including Dysart Taylor, and nevertheless advised Gula to pay the others first. As a sanction, the District Court ordered Dysart Taylor to pay the Fund the amount that it had received in payment from the corporations, $12,855.55. Dysart Taylor appeals. "We review the district court's decision to enter a civil contempt order for abuse of discretion, reviewing its factual findings for clear error." *Jake's, Ltd. v. City of Coates,* 356 F.3d 896, 899 (8th Cir.2004).

3. Steven Gula has not appealed.

Appendix A

Dysart Taylor first asserts that the firm cannot be held in contempt of the December 1996 order because it was neither a final order nor an injunction and it could not be construed as an injunction. We disagree. In our most recent prior opinion in this litigation, when speaking of the amended order of June 1997, we noted that although it "was not labeled an injunction, it looked like one: it compelled the [corporations'] affirmative, prospective obedience with it." *Chicago Truck Drivers,* 207 F.3d at 507. The December order was no different. Dysart Taylor's argument that the order lacked the necessary specificity is unavailing. The order is not "unintelligible," nor does its "command . . . def[y] comprehension." *Int'l Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n,* 389 U.S. 64, 76, 88 S.Ct. 201, 19 L.Ed.2d 236 (1967). While the December 1996 order could have been written with more detail (as it ultimately was in June 1997), it nevertheless put the corporations on notice of what they should do and when they should do it: "to pay to plaintiffs the interim payments demanded by the plaintiffs in the amended demand" and to do so "within 60 days of the date of the judgment order issued herewith." *Chicago Truck Drivers,* 950 F.Supp. at 1471. In any event, the attorneys knew that Gula's corporations were on shaky ground financially and were responsible for substantial interim withdrawal payments. And they should have known, if they did not, that advising Gula to pay other bills (including Dysart Taylor's own bills) before paying the Fund was the same as advising Gula to disregard the order. We conclude that Dysart Taylor was complicit in "a violation of a court order by one who fully understands its meaning but chooses to ignore its mandate." *Int'l Longshoremen's Ass'n,* 389 U.S. at 76, 88 S.Ct. 201.

As for finality, the fact that the Fund sought to amend the order to increase the amount owed by adding on interest, attorney fees, and other costs did not relieve the corporations of responsibility to make the interim payments while they waited for the district court to rule on the motion. An injunction need not be a final and appealable order to be enforceable. And even if this were not an injunction, "[w]ithdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor . . . beginning no later than 60 days after the date of the demand notwithstanding *any* request for review or appeal of determinations of the amount of such liability or of the schedule." 29 U.S.C. § 1399(c)(2) (emphasis added). The corporations thus have arguably had an obligation to pay withdrawal liability from sixty days following the time of the Fund's first demand, and that obligation was not changed but only reiterated when the District Court entered its order in December 1996. *See, e.g., Trs. of Plumbers & Pipefitters Nat'l Pension Fund v. MAR-LEN, Inc.*, 30 F.3d 621, 626 (5th Cir.1994) ("[A] reviewing court merely determines whether the pension plan's claim is nonfrivolous and colorable. If the claim for withdrawal liability is colorable, the employer must make interim payments while it contests the underlying liability." (footnote omitted)); *Bd. of Trs. of Trucking Employees Welfare Fund, Inc. v. Centra*, 983 F.2d 495, 507-08 (3d Cir.1992) ("The pay now, dispute later principle . . . is well established. . . . [P]ayments must be made whether the underlying dispute is resolved through arbitration or by a federal court."). The corporations' failure to make interim payments was a violation of federal law beginning as early as sixty days after the Fund first made its demand, and ultimately came to be a violation of a federal court order as

well. In these circumstances, we do not think it was error for the District Court to entertain a motion for civil contempt based on violation of the court's December 1996 order implementing the Fund's demand.

Dysart Taylor also challenges the District Court's fact-finding on the value of the corporate assets that were available in December 1996 and June 1997 (when the court issued the interim payment orders) and what the law firm knew about that situation; the sufficiency of the evidence supporting the court's findings concerning Dysart Taylor's advice about which entities the corporations should pay first; and the court's failure to find that Dysart Taylor acted in bad faith before the court imposed sanctions for contempt. We conclude that the District Court cited sufficient documentary and testimonial evidence to support the facts as the court found them. *See Chicago Truck Drivers,* 230 F.Supp.2d at 967-68 (E.D.Mo.2002). Moreover, the court had the advantage of being in a position to evaluate the credibility of witnesses and their live testimony. Having conducted our own careful review of the record, we cannot say that the court clearly erred in finding the facts as it did and concluding that the evidence was sufficient to find Dysart Taylor in contempt. Further, we agree that the law firm's bad faith *vel non* is immaterial to the court's finding of contempt in this case.

Finally, Dysart Taylor challenges the court's determination that it was in contempt of the June 25, 1997, order when the firm had been granted leave to withdraw as counsel twelve days before that. Again, we see no error. The District Court did not fashion the contempt order or the

sanction with reference to the two orders, that is, specifying one amount for violating the 1996 order and another for violating the 1997 order. Instead, the court found Dysart Taylor in contempt for failing to advise Gula to use the corporations' remaining assets to pay its withdrawal liability, which liability was set out in the order filed in December 1996 when the firm was actively representing the corporations. The results of Dysart Taylor's contempt was ongoing—the corporations paid the law firm and others, to the exclusion of the Fund, until their assets were exhausted and they were unable to comply with the court's orders.

Because we cannot say that the District Court abused its discretion in finding Dysart Taylor in civil contempt of court and in ordering sanctions, we affirm.

Appendix A

MELLOY, Circuit Judge, dissenting.

I respectfully dissent from the majority opinion. I believe that the lawyers in this case are being penalized for doing what lawyers do. That is, they give advice to clients, sometimes clients who are in financial distress, and get paid for that advice. The district court, and now the majority, have held that doing so may subject the lawyer to civil contempt and the payment of substantial damages. I believe that such a holding puts at peril any attorney who represents financially distressed clients.

In order to fully address my concerns, I think it is important to set forth a chronology of significant events in this case. The Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund (the "Fund") and its trustees brought suit against four trucking companies owned by Steven Gula to collect interim payments for withdrawal liability under ERISA. Appellant Dysart Taylor represented the trucking companies during part of that underlying action that gave rise to the finding of contempt.

On December 4, 1996 the district court granted the Fund's motion for summary judgment. In granting the motion, the court found the defendants liable for the withdrawal of interim payments under ERISA. The district court ordered the trucking companies to begin making interim payments within sixty days. As the majority notes, the Fund, not the defendant, then filed a motion to alter or amend the judgement pursuant to Fed.R.Civ. Proc. 59(e).

Appendix A

The court granted Dysart Taylor leave to withdraw from the case on June 13, 1997. On June 25, 1997 the district court entered an amended judgment against the trucking companies. This amended order clarified the amount owed and the schedule of payments. It required the trucking companies to pay past-due interim payments, liquidated damages, attorneys' fees and costs, interest, and to make quarterly installments beginning August 1, 1997.

The Fund did not receive any payments by November 1998. Accordingly, the Fund moved to hold the corporate defendants and Steven Gula, the corporate defendants' sole officer and shareholder, in contempt. The district court denied the motion and the Fund appealed. On March 24, 2000 we remanded the case after concluding that the district court improperly placed the burden on the Fund to show that the alleged contemnors' inability to pay. *Chicago Truck Drivers v. Brotherhood Labor Leasing*, 207 F.3d 500, 505 (8th Cir.2000) Further, we stated that the Fund was entitled to develop its case against Gula in spite of the fact that he was not named in the prior payment orders.

On remand the Fund filed an amended petition for contempt. The amended petition joined all of the attorneys who had represented the corporate defendants as alleged contemnors, including Dysart Taylor, and the corporate defendants. Following a hearing the district court held that Steven Gula and Dysart Taylor acted in contempt of the court's directives. The district court found that Dysart Taylor was aware that the corporations' assets were insufficient to pay both the Fund and the other creditors, including Dysart Taylor. It also found that the law firm provided legal advice

regarding whom to pay. In particular, the district court concluded that Dysart Taylor aided and abetted Gula's failure to pay the Fund. The district court ordered Dysart Taylor to pay the Fund the amount it had received in payment from the corporations.

The Fund "bears the burden of proving facts warranting a civil contempt order by clear and convincing evidence." *Indep. Fed'n of Flight Attendants v. Cooper,* 134 F.3d 917, 920 (8th Cir.1998). "The contempt power is a most potent weapon, and therefore it must be carefully and precisely employed." *Mahers v. Hedgepeth,* 32 F.3d 1273, 1275 (8th Cir.1994). I do not believe the evidence in this case meets this stringent standard.

When Dysart Taylor received the December 1996 order it was not clear that the order constituted an appealable final injunction. The law firm was faced with advising its client as to what to do. What was the effect of the Rule 59(e) motion? Was the order final, given the filing of the motion to alter or amend? Was the order appealable? Can other operating expenses be paid before payment of the withdrawal liability? Should the company begin paying the judgment (assuming it was a final judgment), appeal, attempt to settle, or file bankruptcy? Dysart Taylor ultimately advised its client that it could pay other creditors and then pay the Fund with any money remaining. Dysart Taylor's receipt of payment for this representation is what gives rise to this contempt proceeding.

Even if one assumes that Dysart Taylor should have realized the December 1996 order should have been

construed as an injunction and gave poor advice, I do not believe its actions rise to the level of aiding and abetting contempt. I part company with the majority when it states that the law firm's bad faith is immaterial to the court's finding of contempt. A law firm that gives legal advice in good faith is not subject to contempt as an aider and abettor of its client. *See In re Watts* 190 U.S. 1, 29, 23 S.Ct. 718, 47 L.Ed. 933 (1903) ("In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment."); *Maness v. Meyers,* 419 U.S. 449, 467, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975) (holding that an attorney is not subject to contempt for good faith legal advice regarding the Fifth Amendment).

In late 1996 and early 1997 the issue of whether the interim order was, in fact, an injunction was not at all clear. At the time the order was entered, even the Magistrate Judge did not believe the order was an injunction as evidenced by his failure to treat it as such in 1996. Although this court stated that the district court's June 25, 1997 order looked like an injunction even if it was not labeled one, it never addressed whether the December 4, 1996 judgment could be construed as an injunction. *Chicago Truck Drivers,* 207 F.3d at 507. Further, merely "looking" like an injunction does not satisfy the clear and convincing evidence standard required to make a finding of contempt.

Moreover, at the time of the entry of the December 1996 order, the case law tended to suggest that the order was not an injunction. The only circuit authority on the issue had

found that such an interim order for payment of ERISA withdrawal liability was not an injunction. The Seventh Circuit held in a case similar to the case at bar, *Trustees of the Chicago Truck Drivers, Helpers and Warehouse Workers Union Pension Fund v. Central Transport, Inc.*, 935 F.2d 114, 117 (7th Cir.1991), that an interim order under ERISA requiring payments pending arbitration is not an injunction.[4] Accordingly, it was not obvious that the order in this case was an injunction. This uncertainty was exacerbated by the legitimate questions the attorneys had regarding whether the order was a final order since the plaintiff filed a timely motion to alter and amend the judgment pursuant to Fed.R.Civ.P. 59(e). To that end, neither party appealed the judgment, likely due to doubt regarding whether it was ripe for appeal. The Fund never tried to enforce the order. It only started execution proceedings in November 1998, after the entry of the final order in June 1997. Accordingly, I firmly believe the movant fell far short of proving by clear and convincing evidence that the defendant law firm aided and abetted a violation of an injunction when the firm did not even realize that an injunction existed.

Even if there was an injunction in place, it is not impermissible to advise a client regarding how to deal with

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4. The Seventh Circuit later found that failure to obey a court order to pay ERISA withdrawal liability may be enforced by a contempt proceeding. *Central States, Southeast and Southwest Areas Pension Fund v. Wintz Properties, Inc.*, 155 F.3d 868, 873 (7th Cir.1998). Our court also so held in the appeal of an earlier order in this case. *Chicago Truck Drivers*, 207 F.3d at 505. However, both of those decisions came well after the events that give rise to this contempt action.

an injunction order and to get paid for those services. In this case, the attorneys had to review the terms of the injunction, confer with their client, respond to the motion to alter and amend the judgment, and review the available options given the fact that there was insufficient money to pay the judgment. In light of the attorneys reasonable belief that the judgment was not an injunction, much less a final injunction, the attorneys' advice regarding how to deal with the order was not sufficiently improper as to rise to the level of contempt.

Finally, I am troubled by the majority's statements that the contempt finding was predicated in part on the fact that, even if there was no injunction, the withdrawal liability was a legal obligation of the company. Slip Opinion at 5. Again, attorneys deal with legal obligations all the time, such as individuals who are delinquent in paying their federal or states taxes, in default on their mortgage, or behind on their credit card payments. Practically every person in a bankruptcy proceeding is delinquent on paying a number of legal obligations. Under the majority's ruling, a lawyer advising a financially distressed client as to how to deal with competing legal obligations is at risk of a contempt citation for providing such advice and receiving payment for those services. As the petitioner correctly suggests, to expose attorneys to a possible contempt in this situation will temper attorney advocacy and impede clients' ability to obtain advice when it is most needed. As the Supreme Court has said in a criminal context:

> If performance of a lawyer's duty to advise a client that a privilege is available exposes a lawyer to the threat of contempt for giving honest advice it

is hardly debatable that some advocates may lose their zeal for forthrightness and independence.

Maness, 419 U.S. at 466, 95 S.Ct. 584 (1975).

Accordingly, I respectfully dissent.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION, DATED AND FILED SEPTEMBER 12, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:93 CV 2376 DDN

CHICAGO TRUCK DRIVERS, HELPERS AND WAREHOUSE WORKERS UNION (INDEPENDENT) PENSION FUND, et al.,

Plaintiffs,

v.

BROTHERHOOD LABOR LEASING, et al.,

Defendants.

MEMORANDUM

This matter is before the court on the amended petition of plaintiffs asking the court to find certain parties in contempt of orders of this court, and to impose sanctions (Doc. No. 358). This aspect of the case was remanded by the Eighth Circuit for further proceedings and for explicit findings on whether the parties have satisfied their respective burdens. *Chicago Truck Drivers Pension Fund v. Brotherhood Labor Leasing*, 207 F.3d 500 (8th Cir. 2000). A hearing was held on the petition on January 29, 2002.

Appendix B

Background

Plaintiffs Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund and its trustees (the Fund), commenced this action in November 1993, against four corporations, related by ownership with shareholders and officers were Steven Gula, William Behrens, and Robert Ferguson. The suit was brought under the Employee Retirement Income Security Act of 1974, as amended by the Multi-employer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1405, to recover withdrawal liability owed the Fund by Be-Mac Transport Company, which withdrew from the Fund in December 1992. Because of their ownership relationships, the four defendant corporations were a "single employer" under 29 U.S.C. § 1301(b)(1).

In February 1993, the Fund notified this company of its withdrawal liability, payable in quarterly installments beginning March 1993. On October 14, 1995, the Fund notified the company that its recalculated withdrawal liability was $455,719.00, payable by the company, and all businesses under common control, in 36 quarterly installments of $17,834, plus a final payment of $1,300.25. The Fund noted that at that point, the corporations were delinquent in their payments in the amount of $196,174, plus interest thereon in the amount of $21,328.21, plus liquidated damages of 20% in the amount of $39,324.80. This letter was attached to the Fund's second amended complaint in which the Fund sought judgment for the delinquent withdrawal liability and an order compelling the corporations to commence making their installment payments. (Doc. No. 126).

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On December 4, 1996, this court sustained the Fund's motion for summary judgment, holding that the four defendant corporations were a single employer jointly and severally liable for the withdrawal liability. The court stated that the corporations "shall be required, within 60 days of the date of the judgment order issued herewith, to pay to plaintiffs the interim payments demanded by the plaintiffs in the amended demand." *Chicago Truck Drivers Pension Fund v. Brotherhood Labor Leasing*, 950 F. Supp. 1454, 1471 (E.D. Mo. 1996). Any other disputes between the parties, such as the amount of the withdrawal liability, were ordered to be submitted to an arbitrator under 29 U.S.C. § 1401. *Id.*

On December 13, 1996, the Fund moved for an amended judgment to require the corporations to pay the past due interim payments from the date of the Fund's original notice and demand, plus interest and liquidated damages thereon, as well as the prospective payments for the remainder of the liability. (Doc. No. 157).

On June 25, 1997, the court issued an amended order. No payments had yet been made pursuant to the December 1996 order. The amended judgment required the defendant corporations to make all past due payments plus interest and liquidated damages thereon for a total of $422,820.81, plus daily prejudgment interest of $64.50 from December 18, 1996. The court also ordered that 23 future payments of $17,834 be made quarterly commencing on August 1, 1997, and continuing through November 1, 2002, with a final payment on February 1, 2003, of $1,300.25. In addition, the court ordered the corporations to pay the Fund's attorney's fees and expenses in the sum of approximately $400,000.

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Chicago Truck Drivers Pension Fund v. Brotherhood Labor Leasing, 974 F. Supp. 751, 756 (E.D. Mo. 1997). On March 18, 1998, this judgment was summarily affirmed. *Chicago Truck Drivers Pension Fund v. Brotherhood Labor Leasing*, 141 F.3d 1167 (8th Cir. 1998) (table decision).

On November 30, 1998, having received no payments from the defendant corporations, the Fund filed a motion for contempt against the corporate defendants and Gula personally. (Doc. No. 269). The court denied the motion, because, following discovery, the Fund was "unable to produce evidence sufficient for a finding that the defendants have assets for making the judgment debt payments but did not do so." (Doc. No. 311).

On appeal, the Eighth Circuit remanded the matter for further consideration. The appellate court held that the payment orders were injunctions, binding upon Gula as the agent of the corporate defendants, and subjecting him, as well as the corporations, to a contempt finding for violation of the orders. *Chicago Truck Drivers Pension Fund v. Brotherhood Labor Leasing*, 207 F.3d 500, 507 (8th Cir. 2000). The case was remanded, because it was unclear whether this court had properly considered the burdens of the parties in a contempt proceeding, and had made no express findings concerning whether Gula committed acts which might support a finding of contempt against him personally. Noting that Federal Rule of Civil Procedure 65(d) makes injunctions binding upon parties' attorneys, the Court of Appeals found "troubling" the suggestion that the corporations' attorneys advised them to pay their legal fees in lieu of making court-ordered payments to the Fund.

Id. at 507 n.7. The court did not address this matter, however, because the Fund had only sought a contempt sanction against the corporations and Gula. *Id.*

In its amended petition for contempt now before the court, the Fund names as alleged contemnors the corporate defendants; Steven Gula and his wife, Ann Gula; Behrens; two individual attorneys (Michael Helt and Peter Gabriel Bender); and four law firms (Dysart Taylor Lay Cotter & McMonigle, P.C. [Dysart Taylor], Evans & Dixon, Lashly & Baer, and Michael Best & Friedrich, LLC [Michael Best]), which represented the corporate defendants or their officers at various times during the underlying lawsuit.[1] The Fund essentially asserts that these parties acted in concert to dissipate the corporations' assets to the alleged contemnors' advantage, ensuring that the payments ordered to be made to the Fund would not be made, in contempt of this court's orders.

On May 15, 2001, the Fund filed its "Prima Facie Case" of contempt in which it asserted that since December 4, 1996, Steven Gula transferred a total of approximately $229,945.56 of the corporate defendants' assets to various third parties, including the other alleged contemnors. Approximately 88% of the corporate expenditures noted by the Fund were paid to the alleged contemnor attorneys and law firms for legal fees. Other expenditures included the purchase of tickets to various sports events. The Fund submitted supporting documentation, primarily in the form of copies of checks.

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1. The Fund has dismissed from these contempt proceedings the Evans & Dixon, LLC, law firm. (Doc. No. 433).

The Fund further asserted that Steven Gula had the corporate defendants funnel his salary through his wife's checking account to avoid Internal Revenue Service's (IRS) garnishments against him. Steven Gula testified by deposition on January 4, 2001, that Dysart Taylor told him that, while the corporate defendants were appealing the court's payment order, he "had the right to pay legal bills and generally-accepted operating expenses and to make the payments described in [the court's order] if there was enough cash available after paying those expenses." Dep. at 13-14. The Fund asserted that attorneys from Michael Best confirmed this advice.

The court concluded that, under the guidelines set forth by the Eighth Circuit in remanding this case, the Fund established a prima facie case of contempt against the alleged contemnors and that an evidentiary hearing was warranted.

Hearing Testimony and Evidence

At the hearing, Ann Gula testified that she knew there were problems with her husband's trucking companies and the IRS, but did not know what they were. She made no decisions regarding the companies, and knew nothing about any judgments issued in the underlying lawsuit. She knew nothing about Steven Gula paying his salary to her so the IRS would not come after that money.

Steven Gula testified that he was the representative of the corporate defendants in the underlying lawsuit and was the person who hired and dealt with the corporations' attorneys. He did not recall receiving a copy of, or seeing,

the court's June 1997 order until after the contempt charges were filed (November 30, 1998). At that point, the issue was essentially moot, because almost all of the corporations' assets were gone. Since the December 1996 judgment, the corporations paid the Gula family approximately $15,000 for rent and utilities. The sports tickets at issue were not paid for by the corporations, but by the customers who used them. Gula testified that he never intended to avoid the judgment of the court. No one ever told him when, how, or to whom to pay the judgment.

Gula further testified that the corporations paid all of Dysart Taylor's fees in the underlying suit (approximately $203,000), except for the costs incurred by the firm for defending itself against a motion for sanctions. In September 1998, Helt refunded to the corporations $8,000, the unused portion of a retainer fee. Gula used this money to pay bills of the corporations, including attorney's fees.

Gula testified that he mistakenly paid monies to Evans & Dixon that were not owed, but he never asked the firm for the money back. Gula hired Bender to represent him personally in a suit against him by the IRS. Gula mentioned the present underlying suit to Bender, but did not discuss it with him.

Gula testified that, in a conversation he had on February 26, 1997, with Howard Lay of Dysart Taylor, the subject of paying the Fund pursuant to the December 1996 order was discussed. According to Gula, they discussed the fact that a motion for reconsideration had been filed and the advisability of filing an appeal. Gula testified that he was told to make

sure no material sums of money from the corporations were paid to himself, but that paying bills for the normal ongoing operations of the corporations was allowable. Gula testified that based on this discussion, it was his understanding that no money would have to be paid to the Fund pursuant to the judgment for a long time because of the appeals process. According to Gula, a settlement offer by the corporations for $50,000 was also discussed, and during this time period, Gula's attorneys were working on several other legal matters for him.

A letter dated February 27, 1997, from Lay to Gula, was introduced into evidence. The letter purports to set forth what was discussed the previous day. No mention is made of Gula paying, or not paying, the Fund. (Gula Exh. B). After Gula expressed concern that Michael Helt, who was dealing with his case, was leaving Dysart Taylor, Lay wrote to Gula on March 27, 1997, that he believed Dysart Taylor should withdraw from representing Gula. (Gula Exh. D). A letter from Lay to Gula dated April 11, 1997, asking Gula to sign and return the withdrawal form noted that Gula had to decide "what needs to be done if [the Fund] begins collection efforts." Lay also wrote that in light of another suit by another pension fund against the corporations for withdrawal liability payments, Gula needed "some strategy to either fight until the money is gone, try to settle with one or more, or file bankruptcy," noting that none of these options was "great." (Fund Exh. 1 at 454-55).

An individual testified at the hearing that he purchased sports tickets through the Gulas and always reimbursed them for the tickets. The last witness to testify was Howard Lay.

He testified that Dysart Taylor had essentially no contact with Steven Gula after the February 26, 1997, conversation and withdrew from the case shortly thereafter. He did not recall any discussion with Gula regarding paying, or not paying, the Fund money pursuant to the December 1996 order. He did not recall telling Gula that he did not have to pay the Fund anything pending an appeal, and doubted that he would have told him that. He testified that it was his practice to memorialize in writing conversations he had with clients, and that, had he discussed paying the Fund with Gula, he would have noted this in the letter of February 27. He did not believe the December 1996 order was an "injunction." Lay further testified that, based on a review of the firm's records, Dysart Taylor received from Gula approximately $12,000 in fees after December 4, 1996.

The Fund introduced into evidence copies of checks showing that after December 4, 1996, Gula issued checks from the corporate defendants for a total of approximately $218,500 to entities other than the Fund. Included in this amount is approximately $28,200 for tickets to sports events, $15,300 to Ann Gula, $39,400 to Michael Helt, $12,900 to Dysart Taylor, $29,000 to Peter Bender, $72,500 to Michael Best, and $4,900 to Behrens (in deferred compensation).

The Fund also introduced the 1996 tax return of one of the defendant corporations which showed $217,894 in cash assets and $89,701 in other assets as of December 31, 1996 (Dysart Taylor Exh. K); and the same corporation's 1997 return which showed $182,692 in cash assets and $90,201 in other assets as of December 31, 1997. (Dysart Taylor Exh. L).

The Fund's exhibits included evidence of requests for payment of fees by Dysart Taylor dated October 19, 1998

(Fund Exh. 1 at 532); by Michael Best dated January 29 and February 1, 1999 (*id.* at 579-80), and by Lashly & Baer in February 1997 (*id.* at 587-88, 560).

Post-hearing Arguments

In its post-hearing brief, the Fund argues that, because Behrens, Michael Best, Lashly & Baer, Bender, and Helt offered no evidence at the hearing, this court should find them in civil contempt for two reasons. First, by not offering any evidence at the hearing, they failed to rebut the Fund's prima facie case, and they raised the inference that any evidence they might have presented would have been adverse to them. Second, the Fund argues that, even if the corporate attorneys did not affirmatively advise Gula not to pay the Fund, their failure to advise him to comply with the court's orders, while at the same time accepting corporate assets that would make it impossible for the corporations to comply with the court's orders, constitutes contempt. (Doc. Nos. 464, 480).

Gula argues that all payments made by him after December 4, 1996, were lawful and appropriate obligations of the corporate defendants. He asserts that none of the attorneys ever sent him copies of the court's December 1996 or June 1997 orders, or ever advised him to pay the Fund anything. He also faults the Fund for not securing the corporate assets during the appeals process. He argues that the evidence does not show any intent on his part to defy the court's orders, and that the Fund has not met its ultimate burden of proving contempt on Gula's part. (Doc. Nos. 456, 468).

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Dysart Taylor argues that the Fund offered no evidence that Dysart Taylor did anything to violate this court's orders or to aid or abet Gula to do so. It argues that the December 4, 1996, order was not a final order and was not an injunction, and that Dysart Taylor withdrew from the case before the court issued the June 7, 1997, order. Dysart Taylor notes that it is undisputed that it told Gula that the corporate defendants should consider bankruptcy or settlement, which was sound legal advice while this court was considering the pending motions to amend or reconsider the December 4, 1996, order. (Doc. Nos. 452, 472).

Findings and Conclusions

"One of the overarching goals of a court's contempt power is to ensure that litigants do not anoint themselves with the power to adjudge the validity of orders to which they are subject." *International Bhd. of Elec. Workers. Local Union No. 545 v. Hope Elec. Co.*, 293 F.3d 409, 415 (8th Cir. 2002) (quoting *Chicago Truck Drivers Pension Fund*, 207 F.3d at 504). One of the purposes of civil contempt proceedings is to compensate the complainant for losses. *Chicago Truck Drivers Pension Fund*, 207 F.3d at 504. A nonparty may be held in contempt where the nonparty is legally identified with, or aids or abets, a named party in a concerted violation of a court order. *Id.* at 505 n.5, 507. The essence of this rule is that parties may not nullify a decree by carrying out prohibited acts through aiders and abetters, although they were not parties to the original proceeding. *Id.*, at 506-07.

It has already been determined by the Eighth Circuit that the district court's contempt power extends to Gula, as a party who had notice of the court's orders and the responsibility to

comply with them. *Id.* at 507. That court also held that Federal Rule of Civil Procedure 65(d), which expressly makes injunctions binding upon nonparties and parties' attorneys, applies to the orders in this case compelling interim withdrawal payments. *Id.* at 505 & n.5 (citing *Central States, SE & SW Areas Pension Fund v. Wintz Props., Inc.*, 155 F.3d 868, 876 (7th Cir. 1998) (company's president held in civil contempt for failing to comply with court order requiring company to make ERISA withdrawal liability payments). Title 28 U.S.C. § 636(e)(4), as amended on November 13, 2000, grants magistrate judges civil contempt authority in cases such as this in which the magistrate judge presides with the consent of the parties.

The Fund, as the party seeking civil contempt, bears the initial burden of proving, by clear and convincing evidence, that the alleged contemnors violated the court's orders. The burden then shifts to the alleged contemnors to show an inability to comply.

> [A] mere assertion of "present inability" is insufficient to avoid a civil contempt finding. Rather, alleged contemnors defending on the ground of inability must establish: (1) that they were unable to comply, explaining why "categorically and in detail;" (2) that their inability to comply was not "self-induced;" and (3) that they made "in good faith all reasonable efforts to comply."

Chicago Truck Drivers Pension Fund, 207 F.3d at 506 (quoted cases omitted); *see also United States v. Santee Sioux Tribe of Neb.*, 254 F.3d 728, 736 (8th Cir. 2001).

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The court first finds that Steven Gula acted in contempt of this court's orders. It is undisputed that all payments made by the corporate defendants after December 4, 1996, were authorized by Gula, and dissipated the corporate assets. Nor is there a material issue as to the disposition of the assets. Even if his testimony that he did not physically see this court's orders until contempt proceedings were initiated were to be believed, the court rejects as not credible any suggestion that he was unaware of the content and import of these orders when they were issued. Although the December 1996 order did not specifically order the corporations to pay the past due withdrawal liability, interest, and liquidated damages, it was clear from the context of the case and the grant of summary judgment to the Fund that the corporations were liable for this amount. There was certainly no ambiguity that quarterly payments of $17,834 had to commence within 60 days of the date of the December order. Rather than make these payments, Gula authorized other payments from corporate assets. Even after the June 1997 order, no payments were made to the Fund.

In terms of the burden-shifting framework set forth above, the court finds that the inability of the corporations, acting through Gula, to comply with the court's orders was self-induced, and that they, again acting through Gula, did not in good faith make all reasonable efforts to comply.

The court also finds that Dysart Taylor acted in contempt of this court by aiding and abetting the violation of the court's orders. The court finds that Dysart Taylor knew that corporate assets were insufficient to comply with the court's orders and at the same time pay Dysart Taylor's attorney's fees.

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Dysart Taylor's April 11, 1997, letter to Gula, presenting as a viable option that Gula "fight until the money is gone," supports this finding.

The record, however, does not support the Fund's allegations of contempt against the other attorneys or law firms involved in this matter. The court finds no credible evidence that any of the attorneys other than Dysart Taylor hinted or suggested to Gula that he should pay their fees in denigration of his obligation to pay the Fund the money owed it. The court is not persuaded that these parties can be held in contempt of court for failing to make sure Gula was meeting his obligation under the court's orders. Thus, the Fund did not meet its burden of proving by clear and convincing evidence that these nonparties aided or abetted the corporations or Gula in a concerted violation of the court's orders.

Appropriate sanctions

In remanding the case, the Eighth Circuit explained that finding Gula in contempt of court

> for failing to direct his corporations to comply with the payment orders does not mean that Gula can now be held personally liable for the underlying withdrawal payments themselves. The Fund did not sue Gula initially for the withdrawal payments; it may not now attempt to obligate him for the underlying judgment through a contempt proceeding. . . . In the event Gula is ultimately found in contempt, it will be up to the court to fashion an appropriate sanction.

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Chicago Truck Drivers Pension Fund, 207 F.3d at 507-08 (internal citations omitted).

The court is mindful that the purpose of a sanction for civil contempt in this case is compensatory and remedial with respect to the Fund; its purpose is not to punish Gula or Dysart Taylor. As noted above, one of the defendant corporations had $217,894 in cash assets at the end of 1996. Proper compliance with this court's orders would have mandated that Gula pay at least this amount to the Fund, pursuant to the December 4, 1996, order, and certainly pursuant to the June 1997 order. The court will order Gula personally to pay the Fund this amount, less the $12,855.55 paid in fees to Dysart Taylor; Dysart Taylor will be required to pay that amount over to the Fund as its sanction. *See Central States SE & SW Areas Pension Fund*, 155 F.3d at 872 (affirming contempt sanction against company's president in the amount the company had paid other creditors rather than the pension fund since the court issued its order compelling the company to make withdrawal liability payments to the fund), *cited with approval* in *Chicago Truck Drivers Pension Fund*, 207 F.3d at 505 & n.5. These sanctions leave the Fund with a significant shortfall compared to the full amount of the judgment it obtained against the corporations. The court finds and concludes, however, that to require either Gula or Dysart Taylor to pay more would be punitive.

An appropriate order is issued herewith.

s/ David D. Noce
DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed this 12th day of September, 2002.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:93 CV 2376 DDN

CHICAGO TRUCK DRIVERS, HELPERS AND WAREHOUSE WORKERS UNION (INDEPENDENT) PENSION FUND, et al.,

Plaintiffs,

v.

BROTHERHOOD LABOR LEASING, et al.,

Defendants.

ORDER

Pursuant to the Memorandum issued herewith,

IT IS HEREBY ORDERED that the amended petition of plaintiffs Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund and its trustees (the Fund) that certain parties be found to be in contempt of orders of this court and to impose sanctions (Doc. No. 358) is granted in part and denied in part.

IT IS FURTHER ORDERED that Steven Gula, having been found in civil contempt of court, pay the Fund $205,038.45, plus interest thereon hereafter at the rate provided by law.

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IT IS FURTHER ORDERED that Dysart Taylor Lay Cotter & McMonigle, P.C., having been found in civil contempt of court, pay the Fund $12,855.55, plus interest thereon hereafter at the rate provided by law.

IT IS FURTHER ORDERED that the petition for contempt is denied as to the other alleged contemnors.

IT IS FURTHER ORDERED that the renewed motion of Lashly & Baer, P.C., for judgment as a matter of law (Doc. No. 475) is sustained.

s/ David D. Noce
DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed this 12th day of September, 2002.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING, DATED JULY 25, 2005

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-3622

Chicago Truck Drivers Helpers & Warehouse Workers Union Pension Fund, et al.,

Appellees,

v.

Dysart, Taylor, Lay, Cotter, & McMonigle, P.C.,

Appellant.

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Bye and Judge Melloy would grant the petition for rehearing en banc.

(5128-010199)

July 25, 2005
Order Entered at the Direction of the Court:

s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION DATED AND FILED DECEMBER 4, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:93 CV 2376 DDN

CHICAGO TRUCK DRIVERS, HELPERS AND WAREHOUSE WORKERS UNION (INDEPENDENT) PENSION FUND, et al.,

Plaintiffs,

v.

BROTHERHOOD LABOR LEASING, MFI LEASING COMPANY, FALLS CITY INDUSTRIES, INC., MIDDLEWEST FREIGHTWAYS, INC.

Defendants and
Counterclaim
Plaintiffs,

v.

CHICAGO TRUCK DRIVERS, HELPERS, AND WAREHOUSE WORKERS UNION (INDEPENDENT) PENSION FUND, et al.,

Counterclaim
Defendants.

Appendix D

JUDGMENT

In accordance with the Memorandum filed herewith,

IT IS HEREBY ORDERED that the motion of the plaintiffs to compel discovery from attorney-witnesses Taylor and Helt (Doc. No. 119) is denied as moot;

IT IS FURTHER ORDERED that the motion of plaintiffs to correct a deposition transcript (Doc. No. 120) is sustained;

IT IS FURTHER ORDERED that the motion of plaintiffs to dismiss the proposed state law counterclaims (Doc. No. 129) is sustained;

IT IS FURTHER ORDERED that the motion of the plaintiffs to dismiss the proposed RICO counterclaim (Doc. No. 133) is sustained;

IT IS FURTHER ORDERED that the motion of the defendants for leave to amend their counterclaims (Doc. No. 136) is denied;

IT IS FURTHER ORDERED that the motion of the defendants for summary judgment is denied; and

IT IS FURTHER ORDERED that the motion of the plaintiffs for summary judgment is sustained in that defendants shall, within 60 days of the date of this judgment order, commence payment to plaintiffs of the interim payments of the withdrawal liability of Be-Mac Transport

Company, Inc., demanded by the plaintiffs in their amended demand. Any unresolved disputes between the parties under the Multiemployer Pension Plan Amendments Act of 1980, except concerning the efficacy of the rescission judgment issued by the United States District Court for the Western District of Missouri, shall be submitted to arbitration under 29 U.S.C. § 1401.

IT IS FURTHER ORDERED that the defendants shall pay the costs of the action.

s/ David D. Noce
UNITED STATES MAGISTRATE JUDGE

Signed this 4th day of December, 1996.

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SUPREME COURT, U.S.
FILED
DEC 16 2005
OFFICE OF THE CLERK

No. 05-527

In the Supreme Court of the United States

DYSART, TAYLOR, LAY, COTTER & MCMONIGLE, P.C.

Petitioner,

v.

CHICAGO TRUCK DRIVERS, HELPERS & WAREHOUSE WORKERS UNION (INDEPENDENT) PENSION FUND, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The Petition for Writ of Certiorari ("Petition") identifies the question presented for review as "whether a law firm can be held subject to the contempt of court sanction, in conflict with the Court's longstanding precedent, for giving legal advice to a client in the absence of any evidence or finding that the law firm gave the advice in bad faith."

Respondents submit that the Petition presents simply the question whether the Eighth Circuit erred in affirming the district court's order holding Petitioner in contempt for advising its client to disobey the district court's order that Petitioner's client make interim ERISA withdrawal liability payments to Respondents.

PARTIES TO THE PROCEEDING

The Petition correctly identifies the parties to the proceeding.

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JURISDICTIONAL STATEMENT

Respondents do not contest this Court's jurisdiction to consider the Petition. Petitioner correctly identifies the basis for this Court's exercise of jurisdiction.

STATEMENT OF THE CASE

Petitioner Dysart, Taylor, Lay, Cotter & McMonigle, P.C. ("Dysart Taylor") is a law firm that represented four corporate defendants whom Respondents sued for failing to make interim payments of withdrawal liability after receiving the Fund's original and amended demands pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* Under ERISA, an employer can contest the amount demanded but must make interim payments under the Fund's schedule while arbitration is pending. *Chicago Truck Drivers Pension Fund v. Century Motor Freight, Inc.*, 125 F.3d 526, 534 (7th Cir. 1997). On December 4, 1996, the district court ordered the corporate defendants to begin making interim payments within 60 days in accordance with the amended demand. *Chicago Truck Drivers Pension Fund v. Brotherhood Labor Leasing*, 950 F.Supp. 1454, 1471 (E.D. Mo. 1996). But the corporate defendants never made interim payments as commanded in the district court's December 1996 order. (Pet. App. 4a.) Instead, they acted on the advice of Dysart Taylor, which had advised the defendants to pay their legal bills and other creditors, and then make the court-ordered interim payments only if any money was left. (Pet. App. 4a.) The district court amended its order in June 1997 to require defendants to pay the past-due interim payments and the Fund's attorney's fees, and to make interim payments beginning August 1, 1997. *Chicago Truck Drivers Pension Fund v. Brotherhood Labor Leasing*, 974 F.Supp. 751, 756-57 (E.D. Mo. 1997). Dysart Taylor withdrew

before the June 1997 Order issued. (Pet. App. 3a.) Defendants later appealed the August 1, 1997 order, and the United States Court of Appeals for the Eighth Circuit summarily affirmed. *Chicago Truck Drivers Pension Fund v. Brotherhood Labor Leasing*, 141 F.3d 1167 (8th Cir. 1998) (Table).

When the corporate defendants continued not to make the required payments to the Fund, the Fund sought contempt against defendants and their owner Steven Gula. (Pet. App. 3a.) The Eighth Circuit, in reversing the district court's initial denial of the Fund's motion, took note of record evidence that Dysart Taylor had advised defendants to pay their legal fees instead of making the interim payments to the Fund ordered by the district court. The court commented that "[t]he suggestion that the Appellees' attorneys advised them to pay their legal fees in lieu of making court-ordered payments, if true, is troubling" and noted that such advice by Dysart Taylor might subject the attorneys to contempt. *Chicago Truck Drivers Pension Fund v. Brotherhood Labor Leasing*, 207 F. 3d 500, 505, 506-08 (8th Cir. 2000).

On remand, the Fund amended its contempt petition to add Dysart Taylor. (Pet. App. 4a.) After a hearing, the district court held Dysart Taylor in contempt for aiding and abetting defendants' violation of its orders and ordered the firm to pay the Fund $12,855.55, the amount of fees it received after the payment orders. *Chicago Truck Drivers Pension Fund v. Brotherhood Labor Leasing*, 230 F.Supp.2d 963, 970 (E.D. Mo. 2002); Pet. App. 30a. The Eighth Circuit affirmed. *Chicago Truck Drivers Pension Fund v. Brotherhood Labor Leasing v. Gula et al.*, 406 F.3d 955 (8th Cir. 2005) (Pet. App. 1a-15a), *rehearing denied* (July 25, 2005) (Pet. App. 33a).

ARGUMENT

The Petition must be denied. The Eighth Circuit's affirmance of the district court's order holding the Petitioner in contempt for advising its clients to ignore the court's orders treads upon well-worn legal ground and presents no issue meriting review by this Court. The Eighth Circuit's opinion in no way conflicts with the precedents of this Court, which have never held that a court may hold attorneys in contempt for advising clients to disobey a court order *only* when it first finds that the attorneys acted in bad faith. Nor does the opinion below conflict with that of any other U.S. Court of Appeals; no Circuit has required a finding of bad faith before holding attorneys in contempt for advising their clients to ignore court orders. As the Petition raises no other issues of significance requiring this Court's examination, the Petition must be denied.

I. The Eighth Circuit's Opinion Is Fully Consistent with This Court's Precedents.

The Petition identifies no genuine conflict between the decision below and this Court's precedents. None of the precedents cited by Petitioner requires a finding of bad faith as a prerequisite to holding attorneys in contempt for advising their clients to disobey court orders. On the contrary, the Eighth Circuit's opinion is fully consistent with this Court's precedents.

The Eighth Circuit's opinion is consistent with the Court's holding in *In re Watts*, 190 U.S. 1 (1903), which Petitioner cites for the general proposition that "unless attorneys act in bad faith, they cannot be subject to contempt when they advise their clients to defy a court order." (Petition at 11.)

Petitioner further quotes the Court's general observation in *Watts* that

> In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment.

190 U.S. at 29. Petitioner omits, unfortunately, the subsequent sentence that reveals this general proposition as *dictum*: "But here we do not have the ordinary case of advice to clients, but the case of judicial action alleged to have been induced by the advice complained of." *Id.* In *Watts*, the district court placed certain property in the hands of an appointed receiver, but a state court that had also asserted jurisdiction over the matter ordered the receiver to surrender the property, even though the state court ultimately lacked jurisdiction. The district court held in contempt the attorneys who had sought this ultimately invalid order from the state court. This Court overturned the district court, finding that the attorneys' act of pressing their clients' case in state court — particularly when the state court *agreed* that it had jurisdiction over the matter — did not rise to contempt of the orders of the district court. *Id.* The facts of the present case could scarcely be more different. Petitioner was not pursuing parallel claims in different courts both asserting jurisdiction over the present case; it simply advised its client to pay its legal and other bills in lieu of complying with an order of the only court involved in the case. *Watts* does not stand for the proposition that, absent "bad faith," attorneys are privileged to advise their clients to ignore court orders; at most it stands for the much more limited proposition that, when two courts assert jurisdiction over a matter and enter conflicting orders, being wrong about which court has ultimate jurisdiction does not rise to contempt of the other court's orders.

Petitioner also misstates the Court's holding in *Maness v. Meyers*, 419 U.S. 449 (1975) by citing it for the proposition that "attorneys cannot be held in contempt if they give their clients advice in good faith, even if the advice is contrary to the law." (Petition at 10-11.) In fact, the Court's holding in *Maness* is much more limited: the Court held that lawyers cannot be held in contempt for advising their clients to invoke the Fifth Amendment privilege against self-incrimination in a proceeding embracing the power to compel testimony. *Maness*, 419 U.S. at 467-68; Petition at 11-12. The Court has never expanded the reach of its narrow holding in *Maness* beyond the context of a client's invocation of the Fifth Amendment privilege. *See, e.g., Beckler v. Superior Court, Los Angeles County*, 568 F.2d 661, 663 n.4 (9th Cir. 1978); *Commonwealth of Pennsylvania v. Local Union 542, International Union of Operating Engineers*, 552 F.2d 498, 506-09 (3d Cir. 1977) ("The narrow holding in *Maness* was based on the peculiar nature of the fifth amendment privilege"); *In re Krisle*, 54 B.R. 330, 343-456 (Bankr. D.S.D. 1985). Indeed, in the *Maness* decision itself the Court emphasized that the principle it announced constituted an exception, not a general rule:

> We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal.... The orderly and expeditious administration of justice by the courts requires that an order issued by the court must be obeyed until it is reversed by orderly and proper proceedings.

419 U.S. at 458-59. The circumstances justifying that exception were unusual: when a witness during trial is

ordered to reveal information that could be incriminating, "compliance could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information is released." *Id.* at 460. Outside the narrow context presented in *Maness*, an attorney can be held in contempt for counseling disobedience with a court order. *See Maness*, 419 U.S. at 459-60; *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1207-08 (11th Cir. 1985); *Fidelity Mortgage Investors v. Camelia Builders, Inc.*, 550 F.2d 47, 58 (2d Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977), *rehearing denied*, 430 U.S. 976 (1977). In the present case, Dysart Taylor did not advise its clients to "take the Fifth;" it simply advised them not to make payments as ordered by the district court. The Eighth Circuit's decision to hold Petitioner in contempt for that advice fully adheres to this Court's precedents, including *Maness*.

The other precedents cited by Petitioner are similarly inapposite. *See In re McConnell*, 370 U.S. 230 (1962) (counsel's statement of his intent to ask questions on subjects forbidden by trial judge not contempt where counsel never actually asked any more such questions); *Offutt v. United States*, 348 U.S. 1 (1954) (holding that in circumstances of open personal hostility between counsel and trial judge, evaluation of contempt charges must be heard by another judge). The Court has simply never propounded a rule that attorneys may not be held in contempt for advising their clients to disobey a court order absent a showing of bad faith. Nothing required the Eighth Circuit to find bad faith by Dysart Taylor before holding that its advice to its client to disobey the district court's orders constituted contempt, and its decision should be left undisturbed by this Court.

II. The Petition Cites No Other Authority That Conflicts with the Eighth Circuit's Opinion.

The Eighth Circuit's holding that attorneys who advise their clients to disobey court orders may be held in contempt does not conflict with the decision of any other Circuit Court of Appeals. On the contrary, the courts that have spoken on the issue have all held that an attorney may be guilty of contempt for advising clients to disobey court orders, regardless of the attorneys' claims of "good faith." *Kleiner*, 751 F.2d at 1207-08; *Fidelity Mortgage*, 550 F.2d at 58. In *Kleiner,* attorneys advised their client to disregard the district court's order to refrain from contacting plaintiff class members. The attorneys argued that no sanctions should issue because their advice, though mistaken, was given in good faith. *Kleiner,* 751 F.2d at 1207. Observing that a lawyer may counsel or assist a client's good faith efforts to test the validity of the law in good conscience, the attorneys argued a lawyer who counsels disobedience to a standing court order stands firmly within ethical bounds. *Id.* at 1207-08. The court rejected that argument, noting:

> As a fundamental proposition, orders of the court "*must be obeyed* until reversed by orderly review or disrobed of authority by delay or frustration in the appellate process . . ."

Id. at 1208, quoting *United States v. Dickinson,* 465 F.2d 496, 509 (5th Cir. 1972), *cert. denied,* 414 U.S. 979 (1973) (original emphasis). The court further noted that "parties and counsel alike are bound by this admonition." *Id.*, citing *Maness v. Myers,* 419 U.S. at 459. "Disobedience of a court order unequivocally merits punishment save in instances in which compliance would necessarily result in 'an *irrevocable* and permanent surrender of a constitutional right.'" *Id.*,

quoting *In re Grand Jury Proceedings*, 601 F.2d 162, 169 (5th Cir. 1979). Upholding the district court's contempt sanction against the attorneys, the Eleventh Circuit concluded:

> When a court issues a ruling, a lawyer must advise his client to comply and must not counsel disobedience. The opposite result, if sanctioned, could only result in the unraveling of the rule of law. *There are few mandates so plain as the command to obey the order of the court.* Nevertheless, petitioners gave comfort and counsel to disobedience, in lieu of review. Under such circumstances, we conclude that the imposition of sanctions was an appropriate act by the district court in defense of its authority.

Id. (citations omitted) (emphasis added). Likewise, though in a less-studied case, the Second Circuit held a lawyer can be cited for contempt for advising his clients to disregard a court order. *Fidelity Mortgage*, 550 F.2d at 58. The Eighth Circuit is not at odds with the other U.S. Courts of Appeals that have spoken on this issue.

Finally, Petitioner cites the decisions — all over fifty years old — of two state supreme courts. But, like all the other precedents cited in the Petition, none of these decisions holds that a finding of bad faith is required before holding an attorney in contempt for advising a client to disobey court orders. In *In re Willis*, 5 So.2d 716 (Ala. 1941), the court found that the terms of an injunction were capable of more than one reasonable interpretation and thus it did not constitute contempt by the city's attorneys to construe the injunction in one of two reasonable ways. In *In re Landau*, 243 N.Y.S. 732 (1930), the court held that an attorney who had erroneously advised his client as to the effects of language in an order could not be held in contempt "*unless* it appears

that he did not limit himself to the giving of advice as to the validity of the order, but went beyond that and *advised a disregard of or disobedience of the order.*" *Id.* at 312 (emphasis added). In *Sidway v. Sidway*, 141 N.Y.S. 391 (1913), the court declined to hold an attorney in contempt given insufficient evidence that he had advised his client (also his brother) to leave the state without paying court-ordered alimony. And in *Oakley v. Cokalete*, 44 N.Y.S. 1070 (1897), the court, like this Court in *Watts*, declined to hold an attorney in contempt of an order staying a trial when the experienced trial judge agreed with the attorney's incorrect but reasonable contention that the order was invalid.

In sum, the Petition cites case after case for a proposition not one of them asserts: that courts may not hold attorneys in contempt for advising disobedience to court orders unless they first find that the attorneys were acting in bad faith. This is not the law, and the Eighth Circuit acted wholly consistently with the precedents of this Court, the other U.S. Courts of Appeals, and the state courts cited in the Petition. Attorneys may properly be held in contempt for counseling disobedience with court orders.

III. The Petition Raises No Other Issues of Significance Meriting This Court's Review.

The second portion of the Petition's Argument is simply a series of red herrings. Petitioner protests that its advice to its clients was *correct*, essentially seeking untimely review of the district court's interim payment orders. Petitioner raises vague, unsupported "policy" arguments having little to do with the facts of this case. Petitioner's attempts to puff this case up with false significance cannot mask the fact that Petitioners were properly held in contempt for advising their clients to ignore an order of the district court.

Petitioner asserts that it should not be held in contempt for giving *correct* advice, which is essentially an assertion that the district court's interim payment order was incorrect, invalid, or ineffective. But the time to challenge either the substance of the order or the district court's authority to enter the order has long since passed. Defendants appealed that order, the Eighth Circuit summarily affirmed, and the defendants' petition for a writ of certiorari was returned as untimely by this Court. Petitioner comes much too late in asking the Court now, seven years later, to reexamine the merits of the district court's order. Moreover, even if an attorney disagrees with a court order, he cannot simply counsel disobedience; he must seek to modify or overturn the order through lawful means. *Maness* at 458-59. Petitioner's argument that its advice was correct must be rejected.

The remainder of the Petition consists of Petitioner's fanciful "parade of horribles." Yet Petitioner's dire predictions as to the effects on the practice of law of the Eighth Circuit's decision have little to do with the realities of the present case. Nothing in the Eighth Circuit's decision subjects attorneys to contempt for pressing "novel or disfavored claims" in "unsettled" or "risky" areas of the law. (Petition at 19.) Petitioner was not pressing a novel or disfavored claim; it simply advised its client to disobey a court order. Nothing in the Eighth Circuit's decision will chill zealous advocacy on behalf of "financially distressed clients" with "competing legal and financial obligations." (Petition at 20.) Petitioner did not advise its client as to how to choose among "competing legal and financial obligations;" it advised its client to place its ordinary financial "obligations" before an order of the district court. Petitioner's assertion that "lawyers are increasingly being sued by non-parties under theories that lawyers owe duties to parties other than their clients," (Petition at 21), is not only wholly unsupported by

any evidence; it also has nothing to do with what happened in this case. The only "third party" to whom the Eighth Circuit claimed Petitioner owed a duty in this case was the district court; yet Petitioner breached that duty when it advised its client to flout the court's orders. Finally, and most astonishingly, Petitioner warns that the Eighth Circuit's decision "invites lawyers to consider their self-interest in avoiding the contempt penalty before representing and advising their clients to their clients' detriment." (Petition at 21.) It is *Petitioner's self-interested advice* that its client subject *itself* to contempt by paying attorneys' fees to Petitioner instead of making court-ordered payments to the Fund that brings this case before the Court.

In sum, the Petition raises no issues of sufficient moment to merit review by this Court. Zealous advocacy must be practiced within the bounds set by the courts. Advising clients to do whatever they want, regardless of what the courts have ordered them to do, while perhaps "zealous," is not advocacy but lawlessness. Principled legal advocacy can take place only in a world where the players respect the authority of the courts. The Eighth Circuit's insistence in the present case that Petitioner respect the district court's authority was reasonable and fully consistent with long-standing precedent. The Petition should be denied.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that the Petition be denied.

Respectfully Submitted,

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